

BEFORE THE MISSISSIPPI ETHICS COMMISSION

JOSHUA F. TOM (ACLU)

COMPLAINANT

VS.

PUBLIC RECORDS CASE NO. R-18-038

CITY OF JACKSON

RESPONDENT

FINAL ORDER

This matter came before the Mississippi Ethics Commission through a Public Records Complaint filed by Mr. Joshua F. Tom, Legal Director for the American Civil Liberties Union of Mississippi, against the City of Jackson (the “city”). The Ethics Commission has jurisdiction over this matter pursuant to Section 25-61-13, Miss. Code of 1972. In accordance with Rule 5.6, Rules of the Mississippi Ethics Commission, the hearing officer prepared and presented a Preliminary Report and Recommendation to the Ethics Commission at its regular meeting on March 8, 2019. The respondent did not object to the Preliminary Report and Recommendation and has thereby waived a right to a hearing on the merits. Accordingly, the hearing officer enters this Final Order in accordance with Rule 5.6, Rules of the Mississippi Ethics Commission.

I. FINDINGS OF FACT

1.1 Joshua Tom, Legal Director for the American Civil Liberties Union of Mississippi (“ACLU”), submitted a public records complaint to the Ethics Commission on October 23, 2018, against the City of Jackson Police Department (“JPD”). The complaint alleges JPD violated the Mississippi Public Records Act by failing to respond to a public records request within the statutory timeframe under the Act and by charging excessive fees for public records.

1.2 According to the complaint, Joshua Tom submitted a public records request to the City of Jackson Police Department (“JPD”) dated September 20, 2018. The ACLU requested the following documents, in electronic format, for the period of January 1, 2018 to present:

A list of all warnings, citations, summonses and arrests issued, under City of Jackson’s Commercial Solicitation ordinance Section 94-2.; and,

A list of solicitors registered with the Chief of Police pursuant to Section 94-2 of the Jackson Code of Ordinances.

1.3 The Office of the City Clerk responded via email on October 2, 2018 (eight working days after the request was received) requesting additional time to respond.

1.4 On October 16, 2018, Mr. Tom sent a follow-up letter to the JPD noting that he had not yet received a response, a violation of the Mississippi Public Records Act.

1.5 After filing this complaint with the Commission, Mr. Tom received a letter from the Jackson Municipal Court denying his request, dated January 28, 2019 (eighty-seven (87) working days from the date of receipt of the public records request, excluding five (5) state

holidays). The letter states the Jackson Municipal Court's computer system "does not have the capability (at this point) to index and search out the warnings, citations, and summonses per Section 94-2 and therefore, it is beyond the Court's reach to provide you with said requested items under Section 94-2." The letter goes on to state, "[a]nd with respect to a list of solicitors registered with the Chief of Police, Municipal Court would not have that information." To date, Mr. Tom has not received any records responsive to this request.

1.6 Additionally, Mr. Tom asserts that JPD is charging excessive fees for public records requests. Mr. Tom filed several separate public records requests to the JPD on various dates and received the following cost estimates:

Request	Responsive Documents	Cost Estimate
A copy of any and all JPD records from October 1, 2015 until the present regarding George Matthews (requested September 28, 2018)	arrest abstract (1 page) 2 incident reports	\$9.00 \$15.00 each
All JPD records for Carey Mazingo and Keith Hyatt (requested October 11, 2018)	arrest abstracts (2 pages)	\$18.00
A copy of any and all JPD records regarding Jimmy Clark (requested October 15, 2018)	arrest abstract (1 page) 23 incident reports	\$9.00 \$15.00 x 23 = \$345.00

1.7 Mr. Tom paid the fees to obtain copies of the documents but had requested that the JPD and the Jackson Public Records Center provide a breakdown or explanation of the \$9.00 charge for arrest abstracts and \$15.00 charge for incident reports. JPD wholly failed to respond or address this inquiry, but the Jackson Public Records Center provided a copy of a fee schedule ordinance adopted by the city on December 1, 2015. This fee schedule provides:

Police records – accident report \$35.00

Police records – verification report/original report \$25.00.

1.8 Finally, without providing the commission with an itemized estimate of the costs to produce the documents provided to Mr. Tom, the city of Jackson explained in its response:

In response to Public Records Request [dated September 28, 2018], the City of Jackson did not claim any exemption to the public records request and produced the documents it had in its possession in response to the Complainant's request.... The Complainant made a request on September 28, 2018. The request was sent to the Legal Department for review on October 2, 2018. Legal review was completed on October 8, 2018. Complainant paid for the request on October 12, 2018 and was notified that his response to his request was ready to be retrieved.

In response to Public Records Request [dated October 15, 2018], the City of Jackson did not claim any exemption to the public records request and produced the documents it had in its possession in response to the Complainant's request.... The Complainant made a request on October 15, 2018. A cost estimate was discussed on October 22, 2018. An adopted fee schedule by the City Council was provided to the complainant on October 23, 2018. Complainant made a payment on November 5, 2018. The response was sent to the Legal Department for review on November 7, 2018. Legal review was completed on November 9, 2018. The complaint was notified that his request was ready to be retrieved on November 9, 2018.

II. CONCLUSIONS OF LAW

2.1 The Mississippi Public Records Act of 1983 (the "Act") declares that public records shall be available for inspection or copying by any person unless a statute or court decision "specifically declares" a public record to be confidential, privileged, or exempt.

2.2 Section 25-61-5(1)(a) mandates that "[n]o public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than seven (7) working days from the date of receipt of the request for the production of the record." Section 25-61-5(1)(b) only allows up to (14) fourteen working days for production of public records when the public body has already provided, within the statutory seven (7) working day period, a "written explanation to the person making the request stating that the record requested will be produced and specifying with particularity why the records cannot be produced within the seven-day period." In this case the City of Jackson had seven (7) working days to respond to Mr. Tom's request.

2.3 Based on the record before the Ethics Commission, it appears the city provided a denial, in writing, on January 28, 2019 - eighty-seven (87) working days after receiving Mr. Tom's request. As a result, the city's denial was untimely, and a violation of the Public Records Act.

2.4 In addition, the denial itself of "[a] list of solicitors registered with the Chief of Police pursuant to Section 94-2 of the Jackson Code of Ordinances" appears improper. No evidence was provided that JPD does not possess such a list. Indeed, the denial letter states only that the Jackson Municipal Court does not maintain such a list.

2.5 However, the denial itself of "[a] list of all warnings, citations, summonses and arrests issued, under City of Jackson's Commercial Solicitation ordinance Section 94-2" appears proper. From the Jackson Municipal Court's letter, it is clear that such a list does not exist, and its computer system is unable to produce such a list. When a public body receives a request for documents that do not exist, the Public Records Act "does not require a public body to create a record in order to respond to a records request." *Shepard*, Miss. AG Opinion No. 2011-00027 (Feb. 4, 2011), citing *Brown*, AG Op. No. 2007-00514 (Oct. 10, 2007) (The public records act does not require a public body "to create documents that do not already exist."); *Robertson*, AG Op. No. 2006-00463 (Oct. 13, 2006) ("This office has often opined that the Public Records Act does not obligate a public body to create a record that does not already exist."); and *Ray*, AG Op.

No. 2005-0560 (Dec. 16, 2005) (“A public body is under no obligation to create a record that does not already exist.”). Mississippi Model Public Records Rules Comment 4.3(5) to Rule 4 is consistent with these AG Opinions: “A public body is not obligated to create a new record to satisfy a records request.” See also, Comment 4.4(4)(a) to Rule 4, Mississippi Model Public Records Rules.

2.6 Finally, a public body “may establish and collect fees reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of searching, reviewing and/or duplicating and, if applicable, mailing copies of public records.” Section 25-61-7(1). “Any staff time or contractual services included in actual cost shall be at the pay scale of the lowest level employee or contractor competent to respond to the request.” *Id.* A public body must collect fees “in advance of complying with the request.” *Id.* This pre-payment, when based upon a reasonable estimate of the actual cost, is a deposit. See Comment 8.4(1), Mississippi Model Public Records Rules. A public body may never charge more than the “actual cost” of providing access to public records. A public body is required to refund any fees collected in excess of the actual time and cost to process public records requests. Any attempt by a public body to impose fees exceeding actual costs reasonably incurred constitutes a willful and knowing denial of access to public records that warrants the imposition of a civil penalty and the award of attorney fees and costs against the public official charging the excessive cost. Harrison County Development Commission v. Kinney, 920 So. 2d 497, 503 (Miss. App. 2006). See also Comment 8.5(4), Mississippi Model Public Records Rules. The same can be said for an estimate that is so high that it does not reasonably reflect the actual costs the public body expects to incur in responding to a records request.

2.7 Rule 8 of the Model Public Records Rules allows a public body to charge \$0.15 per page for photocopies without providing calculations and reasoning for its charges.

If [a public body] charges more than the default rate of fifteen cents per page, a public body should provide its calculations and the reasoning for its charges. A price list with no analysis is insufficient. A public body's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor, the Ethics Commission or a court to determine if the public body has properly calculated its copying charges. A public body should generally compare its copying charges to those of commercial copying centers.

Mississippi Model Public Records Rules, Comments to Rule 8, Section 8.1(1).

2.8 The record before the Ethics Commission contains no evidence that the fees charged to Mr. Tom for his three public records requests reflect the actual cost of producing the records. The city has failed to provide any calculations or reasoning to show that the fees charged - \$9.00 per arrest abstract and \$15 per incident report - reflect the actual cost of searching, reviewing, and duplicating the public records. There is no indication in the city's response that the fees are in any way related to or based on the actual costs incurred by the city in responding to these public records requests. As such, the city must refund Mr. Tom all fees collected, less \$0.15 per page for copying costs.

III. CONCLUSION

WHEREFORE, IT IS HEREBY ORDERED as follows:

3.1 The Ethics Commission finds that the City of Jackson violated Section 25-61-5 by failing to provide a written denial to Mr. Joshua Tom within seven (7) working days of receiving his public records request.

3.2 The Ethics Commission orders the City of Jackson to provide “[a] list of solicitors registered with the Chief of Police pursuant to Section 94-2 of the Jackson Code of Ordinances” to Mr. Joshua Tom within seven (7) working days after a Final Order is issued in this matter, if such a list actually exists.

3.3 The Ethics Commission finds that the City of Jackson violated Section 25-61-7(1) of the Public Records Act by charging Mr. Joshua Tom \$9.00 per arrest abstract and \$15.00 per incident report without providing its calculations and the reasoning for its charges.

3.4 The Ethics Commission orders the City of Jackson to issue a refund to Mr. Joshua Tom for all amounts collected for public records requests dated September 28, 2018, October 11, 2018 and October 15, 2018, less \$0.15 per page for copying costs.

3.5 The Ethics Commission orders the City of Jackson, through its officials and employees, to strictly comply with the statutory deadlines and procedures set forth in Section 25-61-5, and Section 25-61-7(1) which allows a public body to recover the actual costs related to responding to a public records request.

3.6 The Ethics Commission orders the City of Jackson to revise its fee schedule to comply with Section 25-61-7.

SO ORDERED, this the 21st day of March, 2019.

SONIA SHURDEN, Hearing Officer
Mississippi Ethics Commission